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## Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)

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## **TOWARD A FAIRER MODEL OF CONSUMER ASSENT TO STANDARD FORM CONTRACTS: IN DEFENSE OF RESTATEMENT SUBSECTION 211(3)**

Wayne R. Barnes\*

*Abstract:* Standard form contracts permeate our very existence, and now even include contracts we assent to online by way of “clickwrap” and “browsewrap” methods. Notwithstanding the ever-increasing presence and complexity of such standard form contracts, both offline and online, the law of contracts in this area has remained fairly static since before the nineteenth century. The only meaningful salve to the problem of misinformed assent to onerous clauses in standard form contracts thus far has been the unconscionability doctrine, but that doctrine tends to be reserved for the harshest and severest terms. Therefore, a new tool is needed for courts to protect consumers’ interests. Section 211 of the Restatement (Second) of Contracts creates such a tool. Subsection 211(3) provides: “[w]here the [merchant] has reason to believe that the [consumer] would not [assent] if he knew that the writing contained a particular term, the term is not part of the agreement.” This rule has thus far been largely rejected and marginalized by courts and commentators as running afoul of the traditional duty to read, but in fact the rule is quite sensible. It is squarely grounded in the objective theory of contracts, which provides that a party’s manifestations of assent are taken to mean what a reasonable party would think they mean. It also advances contract law by taking into account recent research into the cognitive limitations of human decisionmaking. Businesses should not be allowed to unfairly exploit consumers’ limitations by inserting grossly unfair terms into their contracts. Although the unconscionability doctrine is an important fail-safe protecting consumers entering standard form contracts, subsection 211(3) is also needed to resolve the dissonance between the fictional duty to read on the one hand, and the reality of cognitive limitations and the objective theory of contracts on the other.

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## INTRODUCTION

Standard form contracts are nothing new. Neither are articles about standard form contracts.<sup>1</sup> However, notwithstanding the voluminous

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1. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002); John D. Calamari, *Duty to Read—A Changing Concept*, 43 *FORDHAM L. REV.* 341 (1974); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211 (1995); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 *N.Y.U. L. REV.* 429 (2002); Nathan Isaacs, *The Standardizing of Contracts*, 27 *YALE L.J.* 34 (1917); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 *COLUM. L. REV.* 629 (1943); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203 (2003); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 *U. PA. L. REV.* 485 (1967); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 *U. MIAMI L. REV.* 1263 (1993); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 *U. PA. L. REV.* 1342 (1975); John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 *CORNELL L. REV.* 735 (1982) [hereinafter Murray, *The Standardized Agreement*]; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1174 (1983) [hereinafter Rakoff, *Contracts of Adhesion*]; W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 *U. PITT. L. REV.* 21 (1984) [hereinafter Slawson, *The New Meaning of Contract*]; W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 *HARV. L. REV.* 529 (1971) [hereinafter Slawson, *Standard Form Contracts*]; James J. White, *Form Contracts Under Revised Article 2*, 75 *WASH. U. L.Q.* 315 (1997); Karl Llewellyn, Book Review, 52 *HARV. L. REV.* 700 (1939).

Moreover, the Michigan Law Review recently published an excellent symposium issue devoted exclusively to issues of standard form contracts and, more specifically, “boilerplate.” See *“Boilerplate”: Foundations of Market Contracts Symposium*, 104 *MICH. L. REV.* 821 (2006) (including articles by Omri Ben-Shahar, Lucian A. Bebchuk, Richard A. Posner, Robert A. Hillman, Jason Scott Johnston, Ronald J. Mann, Douglas G. Baird, James J. White, David Gilo, Ariel Porat,

treatment of standard form contracts in the literature, there is no uniform line of thought regarding the appropriate treatment of such contracts. Professor Todd Rakoff thus correctly observed that “the subject [of adhesion contracts] is inherently intractable.”<sup>2</sup> Put another way, since the problem of form contracts was first addressed, “contract law has died,<sup>[3]</sup> and been resurrected,<sup>[4]</sup> reconstructed,<sup>[5]</sup> and transformed.<sup>[6]</sup> Doctrines of adhesion,<sup>[7]</sup> reasonable expectations,<sup>[8]</sup> and unconscionability<sup>[9]</sup> have all been advanced.”<sup>10</sup>

But the battle continues.<sup>11</sup> And the battle has been fought on an increasingly complex battlefield. Form contracts, once the purview of Industrial Revolution-era manufacturing companies and insurance companies, have now permeated virtually all industries and trades, and have also been wholeheartedly embraced by merchants in the online contracting environment.<sup>12</sup> As Professors Robert Hillman and Jeffrey Rachlinski recently noted, “[t]he Internet is turning the process of contracting on its head.”<sup>13</sup> Through a few clicks of the mouse, consumers are agreeing in record numbers to unfavorable, one-sided terms in adhesion contracts. These include many of the standard favorite terms of businesses, such as arbitration clauses, damage limitations, and warranty disclaimers. But, in the online and software contract context, it also increasingly includes new creations such as spyware clauses<sup>14</sup> and

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Robert B. Ahdieh, Kevin E. Davis, Michelle E. Boardman, Stephen J. Choi, G. Mitu Gulati, Henry E. Smith, Margaret Jane Radin, and Todd D. Rakoff).

2. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1176.

3. Meyerson, *supra* note 1, at 1265 (citing GRANT GILMORE, *THE DEATH OF CONTRACT* (1974)).

4. *Id.* (citing Colin K. Kaufman, *The Resurrection of Contract*, 17 WASHBURN L.J. 38, 38 (1977)).

5. *Id.* (citing Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1176).

6. *Id.* (citing Slawson, *The New Meaning of Contract*, *supra* note 1).

7. *Id.* (citing Kessler, *supra* note 1).

8. *Id.* (citing Robert Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970)).

9. *Id.* (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448–50 (D.C. Cir. 1965)).

10. *Id.*

11. *Id.*

12. Hillman & Rachlinski, *supra* note 1, at 431 (citing Robert W. Gomulkiewicz, *The License is the Product: Comments on the Promise of Article 2B for Software and Information Licensing*, 13 BERKELEY TECH. L.J. 891, 895–99 (1998)).

13. *Id.* at 429.

14. See Wayne R. Barnes, *Rethinking Spyware: Questioning the Propriety of Contractual Consent to Online Surveillance*, 39 U.C. DAVIS L. REV. 1545, 1547–48 (2006). “Spyware” and “adware” are somewhat difficult to define, but the Center for Democracy and Technology recently

severe license restrictions.<sup>15</sup> And, in spite of the breadth of the legal literature on such form contract terms, a clear resolution is still elusive.

Contract law has always assumed that consumers have a duty to read the contracts which they sign and are thus bound by all terms in such contracts, regardless of their actual failure to read or understand such terms.<sup>16</sup> The primary principle applied by courts to protect consumers from one-sided terms to which they did not subjectively agree is the unconscionability doctrine.<sup>17</sup> However, this doctrine provides only a fail-safe option for protecting consumers from undesirable terms, as courts tend to only invalidate the most oppressive clauses through unconscionability.<sup>18</sup>

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convened the Anti-Spyware Coalition ("ASC"), which attempted to develop some industry definitions for the terms:

**Adware:** A type of *Advertising Display Software*, specifically certain executable applications whose primary purpose is to deliver advertising content potentially in a manner or context that may be unexpected and unwanted by users. Many Adware applications also perform tracking functions, and therefore may also be categorized as *Tracking Technologies*. Some consumers may want to remove Adware if they object to such tracking, do not wish to see the advertising caused by the program, or are frustrated by its effects on system performance. . . . [S]ome users may wish to keep particular adware programs if their presence subsidizes the cost of a desired product or service or if they provide advertising that is useful or desired. . . .

**Spyware:** The term Spyware has been used in two ways. In its narrow sense, Spyware is a term for *Tracking Software* deployed without adequate notice, consent, or control for the user. In its broader sense, Spyware is used as a synonym for what the ASC calls "Spyware and Other Potentially Unwanted Technologies."

*Id.* at 1555–56 (alteration in original) (quoting ANTI-SPYWARE COALITION, ANTI-SPYWARE COALITION DEFINITIONS AND SUPPORTING DOCUMENTS (2005), <http://www.antispywarecoalition.org/documents/20051027definitions.pdf>). In common parlance, spyware is software that a consumer installs on her computer—usually unwittingly—which software collects personal information about the consumer's online activities and then transmits it back to a third party, usually for purposes of generating "context-specific" advertisements. Sometimes, however, spyware is foisted onto computers for more nefarious reasons, such as personal identity theft.

15. See, e.g., J.D. Biersdorfer, *By Tearing Open That Cardboard Box, Are You Also Signing on the Dotted Line?*, N.Y. TIMES, Oct. 3, 2005, at C4 (describing printer manufacturer Lexmark's toner cartridge license, which requires users to return spent cartridges to Lexmark rather than simply having the cartridges refilled by a Lexmark competitor).

16. See Calamari, *supra* note 1, at 342.

17. See U.C.C. § 2-302 (1989) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.").

18. See Hillman & Rachlinski, *supra* note 1, at 457–58 ("[C]ourts generally find unconscionability when the bargaining process was deficient and the substantive terms oppressive . . . . When a form contains incomprehensible boilerplate, fine print, or otherwise hidden

Overlooked and underappreciated in the debate over the proper treatment of standard form contracts has been a legal rule proposed by the American Law Institute (ALI) in the Restatement (Second) of Contracts in 1979—section 211 of the Restatement, and specifically subsection (3). Section 211 provides:

- (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
- (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
- (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.<sup>19</sup>

Subsection (3) of section 211 provides a rule that is consistent with the objective theory of contracts and with general principles of the assent-based nature of contracts.<sup>20</sup>

Notwithstanding the consistency of subsection 211(3) with theories of assent and the objective theory of contracts, it has largely been

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terms that undermine the user's purpose of contracting or otherwise 'shock the conscience,' courts unhesitatingly apply unconscionability. Not surprisingly, when the context is not so stark the judicial approach is less predictable.”).

19. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

20. See *id.* § 211 cmt. f (“Subsection (3) applies to standardized agreements the general principles stated in §§ 20 and 201. Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.”). Section 20 of the Restatement provides as follows:

- (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
  - (a) neither party knows or has reason to know the meaning attached by the other; or
  - (b) each party knows or each party has reason to know the meaning attached by the other.
- (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
  - (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
  - (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

*Id.* § 20.

criticized<sup>21</sup> and rejected in the recent efforts to draft Uniform Commercial Code (UCC) Revised Article 2, UCC Revised Article 2B, and the Uniform Computer Information Transactions Act (UCITA). Specifically, provisions similar to subsection 211(3) were originally proposed for inclusion in Revised Article 2 but were eventually removed.<sup>22</sup> Similar provisions were also originally included in proposed Article 2B of the UCC, which would have governed software and information contracts.<sup>23</sup> When the American Legal Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) parted ways with respect to Article 2B, NCCUSL continued with an independent proposed uniform law—UCITA.<sup>24</sup> However, by the time Article 2B had been discarded and UCITA was finalized by NCCUSL, the provision similar to Restatement subsection 211(3) had been eliminated.<sup>25</sup>

The purpose of this Article is to demonstrate that, despite the apparent rejection of subsection 211(3) by some of the drafters of Revised Article 2, Article 2B, and UCITA, as well as by other commentators, in fact it is a sensible rule, sounding squarely in the objective theory of contract. It is also warranted in light of recent recognition of the extent of human cognitive and literacy limitations in dealing with standard form contracts.<sup>26</sup> Thus, subsection 211(3) should be reconsidered for adoption and use by courts in contract disputes, especially in light of the ever-increasing number of one-sided contract terms imposed by businesses in electronic commerce. Part I of this Article describes the rise of standard form contracts and the reasons that businesses typically use such contracts. Part II discusses the development of the objective theory of contracts as the basis for finding assent, and will also describe the two primary doctrines applied to standard form contracts: unconscionability and Restatement subsection 211(3). Part III discusses the newly emerging understanding of social and cognitive problems with the current paradigm of consumer consent to standard form contracts, and

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21. See, e.g., Murray, *The Standardized Agreement*, *supra* note 1 at 762–79; White, *supra* note 1, at 325–45.

22. See Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1816 (2000).

23. *Id.*

24. James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 124 (2003).

25. Braucher, *supra* note 22, at 1816.

26. See *infra* Part III.

the implications of this understanding for the legal structure supporting such contracts. Part IV explains why Restatement subsection 211(3) should be revitalized as a rule applicable to standard form contracts.

## I. THE ADVENT OF STANDARD FORM CONTRACTS

A full understanding of this Article requires review of the ascension of form contracts and their current domination of consumer transactions. This Part discusses: (1) the now-ubiquitous use of standard form contracts in all aspects of consumers' transactional experiences; (2) the role of these contracts in widening the gap in bargaining power between powerful business entities and individual consumers; (3) the decline of bargaining in the contracting process; (4) the benefits of standard form contracts to businesses; and (5) the corresponding harms of such contracts to consumers.

The practice of standard form contracting is a universally accepted and acknowledged phenomenon. Recent estimates suggest that ninety-nine percent of all contracts are now evidenced by standard forms.<sup>27</sup> As David Slawson remarked in 1971:

Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.<sup>28</sup>

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27. Hillman & Rachlinski, *supra* note 1, at 431 (citing John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000)); *see also* Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1188–89 (“Today, very likely the majority of signed documents are adhesive.”); Slawson, *Standard Form Contracts*, *supra* note 1, at 529.

28. Slawson, *Standard Form Contracts*, *supra* note 1, at 529. As was aptly described in one of the first scholarly treatments of the then-newly recognized phenomenon of standard form contracts:

No longer do individuals bargain for this or that provision in the contract . . . . The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor. . . . In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements.

Meyerson, *supra* note 1, at 1264 (quoting OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 18 (1937) (reviewed in Llewellyn, *supra* note 1)).



The prevalence of standard form contracts has not diminished since Slawson's observations. Rather, the use of such forms has undoubtedly become even more ubiquitous in the present era.<sup>29</sup>

The impact of the rise in use of standard form contracts has been profound. Henry Maine observed in 1861 that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*."<sup>30</sup> By this observation, of course, Maine meant that society had moved away from stratification based on fixed classes, as with feudalism, and had moved into the much revered "freedom of contract" era, where people were free to transact with, and become obligated to, whomever they wished. However, nearly a century ago, Nathan Isaacs wondered whether the standard form contract phenomenon was threatening to reverse that transformation.<sup>31</sup> That is, Isaacs perceived the rise in standard form contracts as tending to re-classify the contracting populace into dominating lords (the corporations using such contracts) and subservient vassals (the consumers subject to such contracts).<sup>32</sup> Whatever the accuracy of this observation, the rise in standard form contracts no doubt reflected the rising disparity in bargaining power between industry and consumers.<sup>33</sup>

Standard form contracts, which have so pervaded our modern commercial practice, have been described by Professor Rakoff as consisting of seven attributes.<sup>34</sup> First, a standard form contract is typically a printed form containing several terms, and it is in the form of a contract. Second, the form is drafted by one of the parties to the agreement—virtually always a business entity. Third, the business engages in many of the same types of transactions on a routine basis. Fourth, the business almost invariably presents the form to the consumer on a "take-it-or-leave-it" basis. Fifth, the consumer typically signs the form contract after whatever negotiation occurs. Sixth, the consumer does not engage in many transactions of that type, especially compared

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29. Korobkin, *supra* note 1, at 1203.

30. HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Transaction Publishers 2002) (1861).

31. *See generally* Isaacs, *supra* note 1.

32. *Id.*

33. Kessler, *supra* note 1, at 640–41 (citing Note, "Mutuality" in *Exclusive Sales Agency Agreements*, 31 COLUM. L. REV. 830, 830 (1931)) (observing that standard form contracts "could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals," notwithstanding the then-relatively recent breakdown of the feudal order).

34. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1177.

to the volume of such transactions engaged in by the business. Seventh, usually the primary obligation of the consumer is simply the payment of money.<sup>35</sup>

The beginning of the use of standard form contracts represented a shift in the ordinary transactional process. Contract law largely developed around the paradigmatic bargain struck between two individuals after a protracted period of dickering over terms.<sup>36</sup> As a result, all or nearly all of the terms were extensively discussed, negotiated and understood by the contracting parties. The use of standard forms changed this paradigm.

The paradigm shift in the contracting process was facilitated by several changes in the societal market conditions in the late nineteenth and early twentieth centuries.<sup>37</sup> First, commercial enterprises found that standard form contracts increased their profitability.<sup>38</sup> Second, modern standards of living began to require many goods and services, all of which are largely procurable by contract.<sup>39</sup> Third, the complexity of products and the legal implications arising from their use (and misuse) increased greatly.<sup>40</sup> Fourth, the “increased presence of mass commercial communications” increased consumer expectations about the products and services they buy.<sup>41</sup>

These changed social conditions were inextricably intertwined with a decline of the rugged individualism that marked the turn of the twentieth century.<sup>42</sup> “Survival of the fittest” was the mantra of the era, and contract law thus developed as the set of rules governing the struggle between parties to exploit advantages and reach a heavily negotiated, fully dickered agreement.<sup>43</sup> In this context, the duty-to-read rule arose, since a person who willingly chose to bind himself to a document he had not

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35. *Id.*

36. Slawson, *Standard Form Contracts*, *supra* note 1, at 529 (“The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”); *see also* Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1216 (“Deeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace . . .”).

37. Slawson, *The New Meaning of Contract*, *supra* note 1, at 24–25.

38. *Id.* at 24.

39. *Id.*

40. *Id.*

41. *Id.* at 25.

42. *Id.* at 28.

43. *Id.* (citing *Lochner v. New York*, 198 U.S. 45, 56–57 (1905)).

read or understood was generally not protected by the law in this competitive struggle.<sup>44</sup> However, the new social conditions of the day—especially the myriad of products and services involved in modern consumer life and the multifarious complexities involved in their use—contributed to a decline in this individualism. Members of society became increasingly dependent on each other and lost the time and the inclination to cause each contract negotiation to be an epic struggle between competitors.<sup>45</sup> These realities were harbingers of the inevitable correlation between decreasing individualism and the rise of larger commercial enterprises burdened by bureaucratic structures averse to varied and individualized interactions with consumers.<sup>46</sup>

The business and economic reasons for the rise in the use of standard form contracts seem clear enough. Such contracts have come to be utilized in virtually every type of industry and trade, as they are fully customizable depending on the type of transaction and parties involved.<sup>47</sup> Businesses use these forms to insert clauses which reduce or eliminate a myriad of risks.<sup>48</sup> By reducing risks, businesses using standard forms are able to reduce prices charged for goods and services.<sup>49</sup> The prevalent use of standard form contracts is indicative of their near-indispensability to commerce.<sup>50</sup>

Whereas businesses view standard form contracts as an indispensable aid to their commercial activities, consumers have significantly different perceptions. Businesses calculate that they are unlikely to lose a large number of customers from the use of such forms, even if they are substantively unfair to the consumer, because the scenarios addressed by the terms are not statistically likely to occur.<sup>51</sup> As such, they are discounted by the consumer, if recognized and assessed at all.<sup>52</sup>

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44. *Id.*

45. *Id.*

46. *Id.* at 29; see also Kessler, *supra* note 1, at 631 (“A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service. The individuality of the parties which so frequently gave color to the old type contract has disappeared. The stereotyped contract of today reflects the impersonality of the market.”).

47. Kessler, *supra* note 1, at 631.

48. *Id.* Typical clauses include limitations or exclusions of liability, arbitration clauses, jury trial waivers, warranty exclusions, and the like.

49. *Id.* at 632.

50. Slawson, *Standard Form Contracts*, *supra* note 1, at 530.

51. *Id.*

52. *Id.*

Consumers also assume that the business's competitors will offer terms that are just as undesirable.<sup>53</sup>

Thus, from the perspective of the consumer, form contracts: (1) contain terms which may not be changed or negotiated by the consumer; (2) contain terms governing scenarios that are unlikely to occur; (3) are shopped by consumers only as to certain key terms; and (4) are often ignored in favor of considering the reputation of the enterprise (as, for instance, when the customer believes the firm to behave more generously toward consumers than the form contract's terms would otherwise require).<sup>54</sup> In essence, "[t]he consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated."<sup>55</sup>

The fact that consumers do not read standard form contracts is so well accepted and documented as to be virtually enshrined as dogma within the contracts literature.<sup>56</sup> Furthermore, the commercial enterprises that employ standard forms are fully cognizant of the unlikelihood that their customers will read the terms in such forms, let alone understand them.<sup>57</sup>

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53. *Id.*

54. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1225–28. As Professors Hillman and Rachlinski point out:

Consumers also have good reason to believe that the standard terms are not something to worry about. Consumers recognize that boilerplate language is usually a matter of customary practice within an industry, rather than an attempt by a single business to exploit them. . . . Consumers may sign standard form contracts without reading them carefully because they believe that most businesses are not willing to risk the cost to their reputation of using terms to exploit consumers.

Hillman & Rachlinski, *supra* note 1, at 446–47 (citing Burke, *supra* note 27, at 286–90; Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 229 (1998); Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1482 (1989)).

55. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1229.

56. See *id.* at 1179 (citing P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 731 (1979); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 & n.338 (1960); IAN R. MACNEIL, *CONTRACTS* 445 (2d ed. 1978); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 13 (1981); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 349 (1970); K.N. Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665, 673 (1925); Arnold Louis Rotkin, *Standard Forms: Legal Documents in Search of an Appropriate Body of Law*, 1977 ARIZ. ST. L.J. 599, 603; Slawson, *Standard Form Contracts*, *supra* note 1, at 531; William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 425–26).

57. *Id.*

Their awareness of this fact is borne out in the way that merchants tender their forms to consumers.<sup>58</sup> Notwithstanding the near-universal failure of consumers to read and understand the form contracts which they sign, such forms remain an integral part of the modern commercial system. The system presupposes, however fictionally, that the consumer *has* read and understood the form and agrees to all its terms, and it is on this basis that the law of contracts has heretofore subsumed them within its structure.

Accordingly, standard form contracts are firmly entrenched, as their use is now universal. Their use has led to a decline in individual bargaining for myriad reasons, and businesses are unlikely to stop using the forms because of the many benefits of bargaining advantage and efficiency that they present. Consumers, on the other hand, do not read such forms and are generally powerless to vary their terms. Against this backdrop, certain methods have developed for dealing with standard form contracts, as developed in the next Part.

## II. LAW APPLICABLE TO STANDARD FORM CONTRACTS

The law has developed approaches to the phenomenon of standard form contracts. This Part first discusses some of the basic underlying principles that courts have developed in handling form contract disputes. Next, it discusses the objective theory of contracts in order to provide the backdrop against which more specific theories and approaches will be analyzed. It then summarizes the unconscionability doctrine. Finally, it introduces subsection 211(3) of the Restatement (Second) of Contracts. This Part sets the stage for my conclusion that, while the unconscionability doctrine is an important part of contract law, subsection 211(3) should be brought into the mainstream as well, given its consistency with the objective theory of contracts.

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58. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979)). Comment b states in part:

A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms.

RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979).

### A. *Historical Approaches to Standard Form Contracts*

Historically, contract law has been based on the actual or apparent knowing undertaking of promissory obligations. A disconnect exists between that paradigmatic model and the reality of standard form contracts.<sup>59</sup> Indeed, as Professor Meyerson has noted, “[s]tandard form contracts have been in use for over two centuries, and the question of the proper construction of these contracts has haunted contract law ever since.”<sup>60</sup> The law has attempted to deal with standard form contracts differently than traditional, “ordinary,” individually negotiated contracts.<sup>61</sup> The reason is clear enough—standard form contracts signed by consumers pose problems that are not present in traditional, heavily negotiated agreements between merchants.<sup>62</sup> These problems include the difference in bargaining strength between the parties to the contract, the adhesive nature of the terms, and the problem of terms not being read by consumers.<sup>63</sup> However, many of the attempts to deal with adhesion contracts have been characterized by unintelligibility and inconsistency, which on the whole may be unsurprising given that “the subject [of adhesion contracts] is inherently intractable.”<sup>64</sup>

Inevitably, many of the arguments concerning both sides of the debate over standard form contracts have concerned the time-honored virtue of freedom of contract. One perspective is that the refusal to enforce such contracts violates the freedom of contract of the form-drafting

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59. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1180.

60. Meyerson, *supra* note 1, at 1263. Meyerson notes that the first standard form contracts were used in the late 1700s by marine insurers. Meyerson, *supra*, at 1263–64 (citing PRAUSNITZ, *supra* note 28, at 11 (1937), reviewed by Llewellyn, *supra* note 1).

61. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1174. Rakoff identified this differential treatment by pointing to the then newly-promulgated section 211 of the Restatement, as well as newly authored sections of Corbin’s treatise on contracts. Rakoff, *Contracts of Adhesion*, *supra* (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979); 3A CORBIN, CORBIN ON CONTRACTS §§ 559A–559I (C. Kaufman Supp. 1982)).

62. Meyerson, *supra* note 1, at 1264. Meyerson notes, however, that certain commentators have declared that standard form contracts should be treated no differently from individually negotiated contracts between merchants. *Id.* (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 84–86 (2d ed. 1977); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 652–55 (1979)); see also Ware, *supra* note 54, at 1467.

63. Meyerson, *supra* note 1, at 1264. As Meyerson stated in his article, “[i]t is no secret that consumers neither read nor understand standard form contracts.” Meyerson, *supra*, at 1269 (citing Davis v. M.L.G. Corp., 712 P.2d 985, 992 (Colo. 1986); Unico v. Owen, 232 A.2d 405, 410 (N.J. 1967); Holiday of Plainview, Ltd. v. Bernstein, 350 N.Y.S.2d 510, 512 (N.Y. Dist. Ct. 1973)).

64. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1175–76.

enterprise.<sup>65</sup> This argument has always had limits, however. It equates the form-drafting organization with a human being, which is of dubious accuracy and validity.<sup>66</sup> The opposing viewpoint, from the perspective of the consumer, is that enforcing adhesive form terms violates the consumer's freedom of contract.<sup>67</sup> The consumer has no real choice in the matter of whether the terms will be part of the contract or not, and the forms are all one-sided and designed to benefit the drafting enterprise.<sup>68</sup> The consumer is essentially put at the mercy of the form-drafting business.<sup>69</sup>

Karl Llewellyn postulated one of the earliest conceptualizations of the reality of consumer assent to standard form contracts:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.<sup>70</sup>

The "blanket assent" referred to by Llewellyn can be problematic in theory, because it is somewhat like giving the form drafter a "blank check." However, Llewellyn's description of the perceived assent limits the terms which may be imposed on the consumer to those that are neither "unreasonable" nor "indecent."<sup>71</sup> That is, by signing the standard

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65. *Id.* at 1236.

66. *Id.* ("For what gives value to uncoerced choice—the type of freedom that the courts have in mind—is its connection to the human being, to his growth and development, his individuation, his fulfillment by doing." (citing T. GREEN, *On the Different Senses of "Freedom" as Applied to Will and to the Moral Progress of Man*, in LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 1–27 (1917); J.S. MILL, *On Liberty* ch. III, in THE PHILOSOPHY OF JOHN STUART MILL 185, 248–71 (M. Cohen ed. 1961); A. MEIKLEJOHN, POLITICAL FREEDOM 8–28 (1960))).

67. *See id.* at 1237.

68. *See id.*

69. *See id.*

70. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960).

71. *Id.*

form contract, the consumer trusts the business to unilaterally supply the non-dickered terms of the agreement.<sup>72</sup>

Of course, it is important to keep in mind that the vast majority of form contract terms are not especially problematic. Llewellyn correctly noted that most, if not all, unread standard form terms are legitimate and reasonable components of the agreement, and that these terms are unobjectionable. He sought a doctrine to allow the courts to distinguish these clauses from the ones of “oppression or outrage.”<sup>73</sup>

Over time, several commentators have made other specific suggestions or proposals for how to deal with the “oppressive” or “outrageous” clause which appears in a standard form contract. For instance, Professor Arthur Leff observed that, in the case of consumer form contracts which are unread or misunderstood, one of either two extreme opposite conclusions is suggested: (1) the entire adhesion contract is enforceable because it was signed and thereby assented to; or (2) all of the unread form terms are unenforceable because no actual bargaining or consent occurred as to these terms.<sup>74</sup> Prof. Rakoff proposed that form terms which had not been the subject of individual negotiation—so-called “invisible terms”—should be presumed to be unenforceable, and thereby replaced with applicable default rules.<sup>75</sup>

Professor David Slawson famously theorized that standard form contracts should be considered in a similar vein as administrative law. Specifically, he stated that because contracts impose obligations and restrictions on the parties to the transaction at issue, they can be said to constitute law or legislation as to those parties.<sup>76</sup> Although in our society it is very important that any laws be of democratic origin, in fact much of the “law” made by standard form contracts is not democratic in nature

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72. See Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1200 (citing RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1979) (stating that the consumer “trust[s] to the good faith of the party using the form”)).

73. LLEWELLYN, *supra* note 70, at 366 (cited in Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1202) (“[A]mong those terms which plainly are in fact assented to only one time in a thousand there are still many which are sound particularizations of the deal to the business, very useful and wholly within reason; and those ought to be sustained and applied. A workable guide for courts must offer some wherewithal to sort such out from the clauses of oppression or outrage . . .”).

74. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1207 (citing Leff, *supra* note 56, at 349; Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 144 (1970); Leff, *supra* note 1, at 508).

75. Meyerson, *supra* note 1, at 1278 (citing Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1220–48).

76. Slawson, *Standard Form Contracts*, *supra* note 1, at 530.



because only one of the two “citizens” has meaningfully consented to the terms of the contract.<sup>77</sup> Based on the problems with standard form contracts, Slawson proposed that the actively dickered terms be viewed as forming a binding contract. He proposed that the remaining “boilerplate” be scrutinized for consistency with the negotiated terms, in the fashion of administrative regulations which must be consistent with their enabling legislation.<sup>78</sup>

Certain basic principles have emerged within the courts regarding the treatment and enforceability of standard form contracts. Professor Rakoff identified the traditional contract law approach to standard form contracts as comprised of the following four theories:

- (1) The adherent’s signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract.
- (2) It is legally irrelevant whether the adherent actually read the contents of the document, or understood them, or subjectively assented to them.
- (3) The adherent’s assent covers all the terms of the document, and not just the custom-tailored ones or the ones that have been discussed.
- (4) Exceptions to the foregoing principles are narrow. In particular, failure of the drafting party to point out or explain the form terms does not constitute an excuse. Instead, in the absence of extraordinary circumstances, the adherent can establish an excuse only by showing affirmative participation by the drafting party in causing misunderstanding.<sup>79</sup>

Professor Rakoff’s four principles of traditional contract law regarding adhesion contracts—signature as assent, duty to read, agreement to all boilerplate, and narrow exceptions only—are bound up, to some degree, in the objective theory of contracts.<sup>80</sup> That is, the consumer’s subjective assent to each and every term in the standard form is not necessary in order for there to be an operative manifestation of assent. Rather, the consumer’s apparent assent to the standard form as a whole, evidenced

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77. *Id.*

78. *See id.* at 541–42.

79. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1185.

80. *See id.* at 1185–86.

by her signature thereon, theoretically gives the objectively reasonable appearance of contractual consent.<sup>81</sup>

The remainder of this Part discusses the objective theory of contracts, which sheds important light on how courts should begin to construe and interpret standard form contracts given the ever-increasing complexity of such contracts. It also describes the two main approaches to standard form contracts which have gained varying levels of acceptance: unconscionability and Restatement subsection 211(3).

### *B. Objective Theory of Contracts*

The objective theory of contracts is the dominant philosophy of determining assent to contracts.<sup>82</sup> Its development was a jurisprudential reaction to the idea that there had to be a literal “meeting of the minds” between the contracting parties, insofar as requiring both parties to subjectively intend to be bound.<sup>83</sup> Professors Calamari and Perillo attribute the final shift to objective theory, in part, to the mid-nineteenth century change in the rules of evidence allowing litigants to testify for themselves—the new evidence regime provided too much incentive for consumer-witnesses to lie about their subjective intent.<sup>84</sup> Thus, subjective, secretly held intent contrary to the outward manifestations of a party has long been held irrelevant.<sup>85</sup> Judge Learned Hand stated objective theory this way:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the

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81. *Id.* at 1186.

82. *See, e.g.,* Meyerson, *supra* note 1, at 1266–67.

83. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2.2 (1998); *see also* E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 *YALE L.J.* 939, 943–44 (1967).

84. *See* CALAMARI & PERILLO, *supra* note 83, at 26. Professor Perillo has subsequently noted that there were historically three different approaches to contractual intent. First is the “medieval” objective approach, which is purely objective and does not take the individual knowledge of the other party into account at all. Barnett, *supra* note 1, at 628 (citing Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 451 (2000)). The second approach is a purely subjective one, not taking into account any objective viewpoint. *Id.* The third approach is the modern one, which is a modified objective approach, which also takes into account any superior knowledge held by the other party. *Id.* at 629.

85. Meyerson, *supra* note 1, at 1266 (citing 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 26 (1920)) (“In the formation of contracts it was long ago settled that secret intent was immaterial; only overt acts being considered in the determination of such mutual assent as that branch of law requires.”).

parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.<sup>86</sup>

Professors Calamari and Perillo phrase the test this way: "A party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean."<sup>87</sup>

Under either formulation of the objective theory, courts are required to critically analyze the nature of the assents given by each party to a contract, and determine whether and to what extent such assent was reasonable. A recurring example is that of the party who professes to have "only been joking" when she made otherwise contractually operative manifestations of assent. Objective theory rejects these arguments, unless it is shown that the other party knew or reasonably should have known of the jesting nature of the communications.<sup>88</sup>

In the "jesting" situations, two cases are illustrative. In *Lucy v. Zehmer*,<sup>89</sup> two parties discussed the sale of certain real estate.<sup>90</sup> Lucy made a genuine offer to buy the land.<sup>91</sup> Zehmer, who acted as though he seriously intended to sell the land to Lucy, in fact allegedly harbored a contrary secret intent—he claimed at trial that he never subjectively intended to sell, but was rather simply "needling" Lucy because he did not think Lucy could afford the property.<sup>92</sup> The court held that there was a binding contract because a reasonably objective person would have interpreted Zehmer as seriously intending to contract.<sup>93</sup> That is, Lucy was entitled to rely on what a reasonable person in Lucy's position would think Zehmer meant, regardless of what he actually meant, when he outwardly agreed to sell the property. The result was wholly consistent with the objective theory of contracts.

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86. *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

87. CALAMARI & PERILLO, *supra* note 83, at 27.

88. *Id.* at 27; *see also* *Leonard v. PepsiCo*, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999), *aff'd*, 210 F.3d 88 (2d Cir. 2000); *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

89. 84 S.E.2d 516 (Va. 1954).

90. *Id.* at 517.

91. *Id.* at 518.

92. *Id.* at 519.

93. *Id.* at 522.

Another case, which takes the fact scenario of *Lucy* to its logical extreme, is *Leonard v. PepsiCo*.<sup>94</sup> In *Leonard*, Pepsi ran a television commercial, which encouraged consumers to buy Pepsi drink products and collect points which could be redeemed for merchandise.<sup>95</sup> The commercial depicted some of the merchandise which was obtainable, including sunglasses (175 points), a leather jacket (1450 points), and a military Harrier jet (7,000,000 points). The commercial was clearly intended to be humorous, insofar as the stated availability of the Harrier jet was concerned.<sup>96</sup> Nevertheless, Leonard attempted to accept the alleged “offer” of a Harrier jet in return for 7,000,000 Pepsi points.<sup>97</sup> The court rejected Leonard’s claim that a contract for the Harrier jet existed.<sup>98</sup> Rather, the court explained, in painstaking detail, why the commercial was in fact funny, and would be perceived as such by a reasonable person.<sup>99</sup> Therefore, under objective theory, the court held that no reasonable person would objectively view Pepsi as possessing the requisitely serious contractual intent to be bound to provide a Harrier jet in return for any sum of its Pepsi points.<sup>100</sup>

The gist of the objective theory of contracts is that promisees can take the manifestations of the promisor at face value for what such manifestations reasonably appear to mean, unless the promisee actually knows otherwise. This theory has serious implications for standard form contracts, given the widely-accepted reality that consumers almost never read their form contracts. Even though all merchants know that consumers do not read standard form contracts, the law has nevertheless imposed a duty to read them—a conclusion which is to some degree consistent with the objective theory of contracts.<sup>101</sup>

Under the duty-to-read rule, if a consumer signs a form contract, the law has traditionally stated that it is reasonable for the merchant to

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94. 88 F. Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000).

95. *Id.* at 118–19.

96. *Id.* at 120.

97. *Id.* at 119–20. Leonard didn’t actually drink the millions of Pepsis required to obtain the points. Rather, he discovered that Pepsi would sell the points for 10 cents each and submitted a check for approximately \$700,000 to buy the points and redeem them for a Harrier jet. *Id.*

98. *Id.* at 130.

99. *Id.* at 130–32.

100. *Id.*

101. See JOSEPH PERILLO, 7 CORBIN ON CONTRACTS § 29.8 (rev. ed. 2002); see also Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1185–86.

conclude that the consumer has thereby given her assent to the deal.<sup>102</sup> The usual formulation of the principle is that “one having the capacity to understand a written document who reads it, or, without reading it or having it read to him, signs it, is bound by his signature.”<sup>103</sup> This duty to read has been the law’s historical response to the conundrum of consumers not reading the contracts they sign—their signature is nevertheless sufficient under the law to bind them to all the terms in the writing. As described by Professor Robert Braucher during the 1970 ALI meeting: “We all know that if you have a page of print, whether it’s large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion’s mouth and hope it will be a friendly lion.”<sup>104</sup>

The duty-to-read rule is based in sound logic and reason. It was thought early on in the law that if the duty-to-read doctrine did not apply, then no business could count on a signed form contract, because the signer could always claim later that she did not read or understand the language in the document, and commerce would thereby be thwarted.<sup>105</sup> The question now is whether the duty to read has swung the pendulum too far in favor of businesses and against consumers, in light of the ever-increasing complexity of form contracts and the new manner in which such contracts are presented to consumers. This is especially true online, where a consumer may often click her assent without even having the forms in front of her to read. The Article addresses this question after discussing two of the substantive doctrines which have arisen to address extreme clauses in standard form contracts.

### C. *Unconscionability*

Far and away the doctrine most commonly cited as appropriately dealing with problem terms contained in form contracts is unconscionability. The rule is stated in UCC section 2-302 as follows:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may

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102. PERILLO, *supra* note 101, at 402.

103. *Id.* at 402–03 (quoting *Rossi v. Douglas*, 100 A.2d 3, 7 (Md. 1953)).

104. 47 A.L.I. PROC. 525 (1970).

105. PERILLO, *supra* note 101, at 403–04 (citing Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966)).

enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.<sup>106</sup>

The Restatement also has a similar rule which tracks the UCC provision.<sup>107</sup> The purpose of the unconscionability doctrine is to expressly allow courts to police contracts for terms they deem unconscionable.<sup>108</sup> Though “unconscionable” is not defined by the UCC, some definitions give a feel for what the originators of the doctrine may have intended. One court has defined it as “that which ‘affronts the sense of decency.’”<sup>109</sup> One dictionary definition is “lying outside the limits of what is reasonable or acceptable: shockingly unfair, harsh, or unjust.”<sup>110</sup>

Professor Arthur Leff famously divided the unconscionability analysis into two prongs: procedural unconscionability and substantive unconscionability.<sup>111</sup> Procedural unconscionability refers to the quality of the bargaining process.<sup>112</sup> Thus, it is targeted towards conduct such as surreptitious drafting tricks, burial of harsh terms in the fine print, and exploitation of unequal bargaining power between the parties.<sup>113</sup> Substantive unconscionability, on the other hand, is concerned primarily with the actual content of the contract terms themselves.<sup>114</sup> Thus, courts can exclude terms which “are immoral, conflict with public policy, deny

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106. U.C.C. § 2-302 (1989). Citations to the UCC are to the version passed by NCCUSL in 1989, and not to the most recent version passed by NCCUSL in 2003. The 2003 amendments have not yet been adopted by any state and thus are not operative law as of the date of this Article.

107. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”).

108. U.C.C. § 2-302 cmt. 1 (1989).

109. CALAMARI & PERILLO, *supra* note 83, § 9.40 (quoting *Gimbel Bros. v. Swift*, 307 N.Y.S.2d 952 (Civ. Ct. 1970)).

110. *Id.* (quoting WEBSTER’S THIRD UNABRIDGED).

111. Leff, *supra* note 1, at 488.

112. Hillman & Rachlinski, *supra* note 1, at 456–57.

113. *Id.*

114. *Id.* at 457.

a party substantially what she bargained for, or have no reasonable purpose in the trade.”<sup>115</sup>

Unconscionability has an obvious place in policing standard form contracts. Courts are often willing to apply the doctrine to nullify form language containing incomprehensible fine print or other terms which “shock the conscience.”<sup>116</sup> However, short of outright oppression or conscience-shocking terms, courts have been much less predictable in using unconscionability as a tool for policing terms to which consumers did not clearly assent and which are otherwise unfair or extremely unfavorable.<sup>117</sup> The unconscionability doctrine largely fulfills Llewellyn’s vision of the appropriate treatment of assent to standard form contracts. However, it fails to protect consumers in scenarios where there is no semblance of assent to certain contract terms which, though unfair, do not “shock the conscience.” As one commentator noted, “[u]nconscionability should be saved for the extraordinarily unfair. A more precise concept is needed for form contracts.”<sup>118</sup>

*D. Restatement (Second) of Contracts Subsection 211(3) and Reasonable Expectations*

The drafters of the Restatement attempted to devise a more precise doctrine for form contracts. Specifically, the ALI promulgated subsection 211 of the Restatement (Second) of Contracts to address the effect of the adoption of a standard form as the operative contract between the parties.<sup>119</sup> Subsection (1) of section 211 provides that such standard form contracts are presumed enforceable if the contracting parties in fact manifested some type of assent and the contract provisions are sufficiently “standard”—that is, the consumer “has reason to believe that like writings are regularly used to embody terms of agreements of the same type.”<sup>120</sup> Based on the premise of enforceability in the event the

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115. *Id.* (citing ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW* 138 (1997)).

116. *Id.* (citing John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 295 (2000); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965)).

117. *Id.* at 457–58 (citing Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 472–74 (1995)).

118. Meyerson, *supra* note 1, at 1286 (citing Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982)).

119. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

120. *Id.* § 211(1).

consumer manifests outward assent to a form—such as by signing or perhaps clicking—section 211(1) otherwise incorporates the traditional duty to read all terms in a form contract, with the corresponding implication that the consumer is bound by all such terms.<sup>121</sup>

Section 211's provisions reach further, however. Subsection (3) provides that "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>122</sup> In this subsection, the "other party" is almost invariably the business that drafted the standard form, and the party which appears to manifest assent is the consumer entering into the transaction with the business.<sup>123</sup> Stated differently, subsection (3) states that if a business entity either knows for a fact, or has a good idea, that the consumer would not agree to the standard form contract if she knew the content of at least one of the terms, that term will not be enforced. Subsection (3) sets a high standard—section 211 operates on the assumption that consumers will not read the language in a standard form contract, and therefore, consumers' simple ignorance of offensive provisions is not sufficient.<sup>124</sup> However, subsection 211(3) is designed to deter merchants from exploiting the reality that consumers do not read standard form contracts, and thus prevents consumers from being "bound to unknown terms which are beyond the range of reasonable expectation."<sup>125</sup>

Subsection 211(3) has not been expansively adopted by courts across the country. In 1997, Professor James White, concerned by the potential inclusion of a provision similar to Restatement subsection 211(3) in UCC Revised Article 2, analyzed case law decided under subsection 211(3) and made several observations.<sup>126</sup> First, the majority of the cases decided under the section came from Arizona.<sup>127</sup> Second, a large

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121. See Hillman & Rachlinski, *supra* note 1, at 458.

122. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979).

123. See *id.* § 211 cmts. a, f.

124. *Id.* § 211 cmt. b ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms.")

125. *Id.* § 211 cmt. f. The comment further provides: "a party who adheres to the other party's standard terms does not assent to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that the agreement contained the particular term. Such a belief or assumption may be shown by the prior negotiations or inferred from the circumstances. Reason to believe may be inferred from the fact that the term is bizarre or oppressive . . ." *Id.*

126. See White, *supra* note 1.

127. *Id.* at 324–25.



majority of cases decided under subsection 211(3) were insurance disputes, and thus presumed by White to be inapplicable to non-insurance commercial contract disputes.<sup>128</sup> Third, White concluded that the courts had changed the focus of subsection 211(3) from the merchant's expectations to solely the *consumer's* expectations.<sup>129</sup> This misapplication was troublesome to White because of the resulting possibility of testimonial abuse.<sup>130</sup> Perhaps in part because of White's article, and no doubt in response to the general concerns of merchants that their form contracts would be unduly unsettled, the provision was eventually excluded from Revised Article 2.<sup>131</sup> Thus, the doctrine did not gain the additional acceptance and application that may have resulted from being included as positive law in the UCC, as opposed to merely in the Restatement.

It seems, however, that White's principal objection is easily answerable. White was correct that Arizona judges misconstrued subsection 211(3) to the extent that they began to ignore the merchant's perspective and looked solely to what the consumer reasonably expected. The section is designed to prevent this type of analysis by requiring proof that the *merchant* should have known that one or more of the terms would have been objectionable to the consumer. Thus, it is less clear what White's opinion would have been had the Arizona judges not misconstrued the section. "Misapplication of legal rules by activist judges is always a risk, however, and Professor White's condemnation of the rule is therefore not as severe as it might otherwise appear."<sup>132</sup>

Following suit, others have criticized subsection 211(3) as well. Professor David Slawson, for one, opined that it did not actually give consumers very much additional protection: "the exception [subsection (3)] presumably would not protect a consumer whose particular expectations the form-user had no reason to know beforehand."<sup>133</sup> But this objection focuses exclusively on the merchant's knowledge of each consumer's *subjective* expectations. Slawson's objection is answered by

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128. *See id.* at 325.

129. *See id.* at 346–47.

130. *See id.* at 323–24 ("[M]erchants will see consumer hordes set free from their legitimate contractual obligations and swarms of plaintiffs' lawyers filing class actions against the likes of Sears, GMAC, and Hertz.").

131. *See Braucher, supra* note 22, at 1816.

132. David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241, 291 n.223 (2001).

133. Slawson, *The New Meaning of Contract, supra* note 1, at 62.

stating that courts should also take into account the merchant's awareness of what an objectively reasonable consumer would expect—if, for instance, a merchant knows that most consumers would find a particular term offensive, then she is on notice that subsection 211(3)'s provisions may apply. Another common objection to subsection 211(3) is that it would nullify terms that are not unconscionable or obtained by fraud.<sup>134</sup> But why this is an undesirable result is not articulated, other than the belief that existing law is sufficient. Subsection 211(3) simply requires an appraisal of the merchant's awareness that a particular term was a "deal-breaker" for the consumer. If the merchant knew of this attitude about such a term, but slipped it into the contract anyway, subsection 211(3) invalidates the term. What is offensive about such a doctrine? Nonetheless, subsection 211(3) has more than its share of critics, so its further defense is warranted.

Before turning to such a defense, I wish to briefly mention the reasonable expectations doctrine. Though conceptually related to subsection 211(3), it is distinct both historically and in application. This doctrine, which is primarily applied in insurance law, provides that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations."<sup>135</sup> The reasonable expectations doctrine empowers courts to refuse to enforce contract terms if those terms are inconsistent with what the consumer reasonably expected the contract to provide.<sup>136</sup> Interestingly, subsection 211(3) was debated in the ALI proceedings the same year that the doctrine of reasonable expectations was first introduced in academic scholarship. In fact, the original draft of subsection 211(3) was similar to the reasonable expectations doctrine because that draft stated: "[w]here the other party has reason to know that the party manifesting such assent believes or assumes that the writing does not contain a particular term, the term is not part of the agreement."<sup>137</sup> However, by the end of the 1970 ALI proceedings, a compromise had been reached and the present subsection 211(3)

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134. Raymond Nimmer, *UCITA: A Commercial Code for the New Commerce*, 617 PLI/Pat 635, 649 (Sept. 2000).

135. Keeton, *supra* note 8, at 967. Professor Keeton is considered to have been the originator of the reasonable expectations doctrine. See Hillman & Rachlinski, *supra* note 1, at 459 n.170; Ware, *supra* note 54, at 1461.

136. See Ware, *supra* note 54, at 1466–75; see also Hillman & Rachlinski, *supra* note 1, at 459.

137. RESTATEMENT (SECOND) OF CONTRACTS § 237(3) (Tentative Draft No. 5, 1970).

language was agreed upon, focusing the inquiry on whether the consumer would have refused to enter into the contract.<sup>138</sup> Even among the ALI members, it seems as though this compromise was required to make subsection 211(3) palatable, and as a result, it would seem there is little hope that the reasonable expectations doctrine will prevail in the contract law context. There is hope, however, for subsection 211(3) in its final form, which is addressed in Part IV.

In sum, courts have developed several principles to deal with standard form contracts, including the duty-to-read rule and the binding nature of all boilerplate language. The objective theory of contracts is the dominant theory of mutual assent in modern contract law, and has important implications for standard form contracts, some of which will be explored in more detail in Part IV. The unconscionability doctrine stands as an important, but limited, safeguard against the imposition of undesirable and unfair terms. Restatement subsection 211(3) provides a more custom-tailored resolution to the standard form contract problem, but its acceptance to date in the legal and academic community has been limited.

### III. EMERGING RECOGNITION OF DEFICIENCIES IN CONSUMER COGNITION AND LITERACY

The legal principles discussed above were developed with very limited knowledge of the way in which humans interact with standard form contracts. Now, however, scholars have begun to seriously examine the realities and myths underlying the interactions of consumers with such contracts. These examinations shed new light on the standard form contracting process. Traditional legal principles should be reassessed in light of newly emerging data about our cognitive and psychological limitations in order to determine whether the principles have continuing vitality or should instead be modified. This Part explores three broad areas of these human frailties: (1) cognitive and psychological limitations—including bounded rationality, disposition, and defective capability; (2) social factors and pressure; and (3) literacy problems.

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138. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979); see also Meyerson, *supra* note 1, at 1287. Professor Allan Farnsworth, who would eventually succeed Braucher as the Reporter for the Second Restatement, preferred the original reasonable expectations-type formulation to the final agreed-upon language but was not able to persuade the other drafters to change the provision back to its original wording. See *id.* at 1288.

### A. Cognitive and Psychological Problems

In 1995, Professor Melvin Eisenberg, a pioneer in the field, published his seminal article entitled *The Limits of Cognition and the Limits of Contract*.<sup>139</sup> Other scholars have since joined the debate, including Robert Hillman and Jeffrey Rachlinski,<sup>140</sup> Russell Korobkin,<sup>141</sup> and Alan White and Cathy Lesser Mansfield.<sup>142</sup> Eisenberg's groundbreaking article sought to describe the "complex of social propositions [which] supports the bargain principle."<sup>143</sup> The traditional assumptions undergirding the bargaining process are that parties can judge what is of value to them, contracts are made purposefully for economic gain, and enforcing such contracts produces net social value.<sup>144</sup> These assumptions, Eisenberg noted, have always rested on the premise that contracting parties "act with full cognition to rationally maximize [their] subjective expected utility."<sup>145</sup> However, he observed that some contract doctrines limit the full extent to which parties may freely bargain, not because of any wrongful activity by the parties, but instead because of our cognitive limitations.<sup>146</sup>

The process of contracting necessarily involves actions taken in view of the future, and thus is always characterized by uncertainty.<sup>147</sup> Traditional economic theory posits that under such uncertainty a

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139. Eisenberg, *supra* note 1.

140. Hillman & Rachlinski, *supra* note 1.

141. Korobkin, *supra* note 1.

142. Alan M. White and Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002).

143. Eisenberg, *supra* note 1, at 211.

144. *See id.* at 211–12.

145. *Id.* at 212.

146. *See id.* Eisenberg acknowledged that some of the bargaining limits imposed by contract law have to do with reasons other than cognitive limitations:

Notwithstanding the bargain principle, contract law sets a variety of limits on the full enforcement of bargain promises. Some of these limits apply to cases in which the promisor has conducted himself in a blameworthy manner. Many of the traditional defenses to contract formation, like duress and misrepresentation, rest on this basis in whole or in part. The principle of unconscionability, developed and elaborated within the last forty years, is similarly rooted in the idea that a party who has bargained unfairly should not be able fully to enforce the resulting contract. Essentially, the highly general principle of unconscionability has given courts a warrant to develop more specific doctrines for review of contracting behavior that involves some kind of unfair exploitation of one party by the other, as in the doctrine of unfair surprise.

*Id.* (citing U.C.C. § 2-302 (1989); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 799 (1982)).

147. *See* Eisenberg, *supra* note 1, at 213.

contracting party will rationally choose alternatives that yield the maximum anticipated utility.<sup>148</sup> This model of rational choice is predicated on the assumption that consumers “know, or can know, all the feasible alternative actions open to them, that they know, or can easily discover, all relevant prices, and that they know their wants and desires.”<sup>149</sup> However, as Eisenberg observed, contracting parties often violate this rational choice model premised on expected utility-maximizing conduct because of “limits of cognition.”<sup>150</sup> That is, consumers have finite cognitive abilities at their disposal in ascertaining the risks involved in entering into a standard form contract.<sup>151</sup> In his article, Professor Eisenberg identified three specific types of cognitive limits affecting contractual behavior: (1) bounded rationality and rational ignorance limits; (2) disposition limits; and (3) defective capability limits.<sup>152</sup>

### 1. *Bounded Rationality and Rational Ignorance Limits*

The bounded rationality limitation is concerned with the fact that humans are not supercomputers.<sup>153</sup> Because of limits on time, financial resources, and available energy, not to mention things like computational proficiency and memory capacity, we cannot gather unlimited information and perform extensive calculations to produce a perfect, or “optimal,” decision during the contracting process.<sup>154</sup> Given

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148. See *id.* (citing ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 10–14, 146–63 (1988)).

149. See *id.* at 213 (citing Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385, 385–86 (1989)). Eisenberg cited Ulen further to illustrate additional assumptions about the cognitive powers of contracting parties:

[t]hat individual decisionmakers can compute (subjective) probability estimates of uncertain future events; that they perceive accurately the dollar cost or outcome of the uncertain outcomes; that they know their own attitudes toward risk; that they combine this information about probabilities, monetary values of outcomes, and attitudes toward risk to calculate the expected utilities of alternative courses of action and choose that action that maximizes their expected utility.

*Id.* (citing Ulen, *supra*, at 386).

150. *Id.* at 213.

151. Hillman & Rachlinski, *supra* note 1, at 450 (citing Eisenberg, *supra* note 1, at 214–16).

152. See Eisenberg, *supra* note 1, at 213.

153. See Korobkin, *supra* note 1, at 1216–44 (discussing bounded rationality theory and its implications for countering the usual assumptions of consumers’ rational choices in economic theory of contracts).

154. See Eisenberg, *supra* note 1, at 214; see also Hillman & Rachlinski, *supra* note 1, at 451 (“Psychologists long have believed that when making a decision, such as whether to enter into a contract, people rarely invest in a complete search for information, nor do they fully process the

these difficulties and limitations, parties do not bother with the impossible “optimal” decision, but rather attempt to make a merely “satisfactory decision”:

An alternative is optimal if: (1) there exists a set of criteria that permits all alternatives to be compared, and (2) the alternative in question is preferred, by these criteria, to all other alternatives. An alternative is satisfactory if: (1) there exists a set of criteria that describes minimally satisfactory alternatives, and (2) the alternative in question meets or exceeds all these criteria.

Most human decisionmaking, whether individual or organizational, is concerned with the discovery and selection of satisfactory alternatives; only in exceptional cases is it concerned with the discovery and selection of optimal alternatives . . . . An example is the difference between searching a haystack to find the sharpest needle in it and searching the haystack to find a needle sharp enough to sew with.<sup>155</sup>

One of the consequences that logically follows from the inability of humans to make truly optimal decisions is that they will inevitably remain rationally ignorant of certain choices.<sup>156</sup> Therefore, the major implication of the bounded rationality limitation on cognition is that

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information they receive.” (citing Eisenberg, *supra* note 1, at 214–16; Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717, 720 (2000) [hereinafter Hillman, *Behavioral Decision Theory*]; Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 305 (1998))).

155. See Eisenberg, *supra* note 1, at 214 (quoting JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 140–41 (1st ed. 1958)) (alteration in original). Eisenberg notes that Simon has proposed a decisionmaking model called “satisficing”: “[w]hereas economic man maximizes—selects the best alternative from among all those available to him, his cousin, administrative man, satisfices—looks for a course of action that is satisfactory or ‘good enough.’” Eisenberg, *supra*, at 215 (quoting HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR* xxix (3d ed. 1976)); see also Hillman & Rachlinski, *supra* note 1, at 451 (noting that consumers “rely on casually acquired, partial information, sufficient to make them comfortable with their choice: a process referred to as ‘satisficing’” (citing Thomas, *supra* note 154, at 305–16; MARCH & SIMON, *supra*, at 140–41; David M. Grether, Alan Schwartz & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 287 n.18 (1986))).

156. See Eisenberg, *supra* note 1, at 215; see also Hillman & Rachlinski, *supra* note 1, at 451–52 (“[P]eople tend to reduce their decisions to a small number of factors, even as they claim to use multiple factors. This narrow cognitive focus might be sensible, in fact. Numerous studies indicate that people who rely on simplified decisionmaking models also tend to make better decisions than if they used complicated models.”) (citing Robyn M. Dawes, *The Robust Beauty of Improper Linear Models in Decision Making*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 391, 394–95, 401–02 (Daniel Kahneman et al. eds., 1982)).

humans have limited capacities both for the amount of information they can consider in their decisions and for processing the information that they do take into account. In fact, psychologists have determined that when consumers engage in such selective information processing, they are motivated to interpret contract language in a manner that is consistent with their decision to enter into the contract in the first place.<sup>157</sup> Thus, consumers' contracting decisions are bound to be imperfectly decided, and this shortcoming has implications for contract doctrine, as will be shown below.

## 2. *Disposition Limits*

The second cognitive limitation discussed by Eisenberg is that of disposition. In short, people are overly optimistic and thus underestimate the possibility of negative consequences resulting from their behavior.<sup>158</sup> Empirical studies reveal that this undue optimism affects expectations in all areas of life, including driving ability, likelihood of domestic accidents, prospects for professional accomplishments, and probability

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157. Hillman & Rachlinski, *supra* note 1, at 452–53 (“Although there are few studies on consumer responses to standard form contract, psychologists have demonstrated that people often engage in such ‘motivated reasoning,’ meaning that they make inferences consistent with what they want to believe. People also interpret ambiguous evidence in ways that favor their beliefs and desires. Because consumers usually encounter standard forms *after* they have decided to purchase the good or service, they will process the terms in the boilerplate in a way that supports their desire to complete the transaction.”) (citing Eisenberg, *supra* note 1, at 243; Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 495 (1990); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 97–98 (1980); Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603 (1980)).

158. See *id.* at 216 (citing Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980)); see also Hillman & Rachlinski, *supra* note 1, at 453–54 (“[A]lthough people commonly overestimate the importance of adverse risks, they underestimate adverse risks they voluntarily undertake. . . . This overoptimism also extends to legal obligations. Because consumers voluntarily enter into contracts, they will tend to believe that they can also safely discount the low-probability events covered by standard terms. People intending to purchase a product likely will overstate their own ability to assess the reputation and good faith of the person or company with whom they are interacting.”) (citing Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 367 (1988); Eisenberg, *supra* note 1, at 216; Hillman, *Behavioral Decision Theory*, *supra* note 154, at 723–24; Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1429–30 (1983)); cf. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (discussing overoptimistic perceptions of the unlikelihood of divorce upon marriage).

of successful marriages.<sup>159</sup> Along these same lines, empirical evidence also reveals that people are highly confident of their capacity for resolving difficult and complex issues.<sup>160</sup> Therefore, the disposition cognitive limitation reveals that individuals are unduly optimistic. They seriously underestimate the risk of any problems occurring in their everyday lives and believe they can always surmount any obstacles they face. While this mentality may aid one's outlook on life,<sup>161</sup> more caution and skepticism than typically occurs may be warranted—especially with regard to consumers facing standard form contracts.

### 3. *Defective Capability Limits*

The third category of cognitive limitation discussed by Eisenberg is that of defective capability. “[D]efects in capability systematically distort the way an actor searches for, processes, and weighs information and scenarios.”<sup>162</sup> This broad limitation is actually comprised of several different decisionmaking processes—known as heuristics—which are faulty in various ways and, therefore, prone to result in erroneous decisions.<sup>163</sup> One of these defective heuristics, known as availability,<sup>164</sup>

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159. See Eisenberg, *supra* note 1, at 216–18. The empirical evidence on domestic accidents included findings that the overwhelming majority of consumers felt that their risk for injury from operation of bicycles or lawn mowers was exceedingly low, and the same was true with concerns as diverse as bleach, drain cleaner, and gas poisoning. See *id.* at 216–17 (citing W. KIP VISCUSI & WESLEY A. MAGAT, *LEARNING ABOUT RISK: CONSUMER AND WORKER RESPONSES TO HAZARD INFORMATION* 94–95 (1987)). With respect to life achievements, the great majority of college students surveyed felt extremely optimistic about their prospects for eventual home ownership, avoidance of alcohol problems, job satisfaction, and marital stability. See *id.* at 217 (citing Weinstein, *supra* note 158, at 809–14).

160. See *id.* (citing Ward Edwards & Detlof von Winterfeldt, *Cognitive Illusions and Their Implications for the Law*, 59 S. CAL. L. REV. 225, 239 (1986)).

161. See, e.g., NORMAN VINCENT PEALE, *THE POWER OF POSITIVE THINKING* (Prentice Hall, Inc. 1953) (1952).

162. Eisenberg, *supra* note 1, at 218.

163. See *id.* (citing Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S251 (Supp. 1986)); see also Hillman & Rachlinski, *supra* note 1, at 450–51 (“Consumers have limited cognitive resources with which to assess the risks associated with a contract. Consequently, they rely on mental shortcuts or rules of thumb to guide complex decisions about risks. These rules of thumb lead people to worry too much about risks in some circumstances, and not enough about risks in others.” (citing Eisenberg, *supra* note 1, at 214–16; Hillman, *Behavioral Decision Theory*, *supra* note 154, at 721; Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 696–714 (1999))).

164. See Eisenberg, *supra* note 1, at 220 (citing ROBYN M. DAWES, *RATIONAL CHOICE IN AN UNCERTAIN WORLD* 92–94 (1988); SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION*



posits that people evaluate data based on factors immediately available to them, often giving disproportionate value to such factors.<sup>165</sup> For instance, “[i]t is a common experience that the subjective probability of traffic accidents rises temporarily when one sees a car overturned by the side of the road.”<sup>166</sup> A second defective heuristic is representativeness. This heuristic is invoked when people make erroneous decisions based on statistically unsound samplings of data they nevertheless judge to be sufficiently representative.<sup>167</sup> A third defective heuristic is that of faulty telescopic faculties. This decision process occurs when people value present and immediate benefits and expenditures disproportionately more than they value benefits or expenditures which may occur in the future.<sup>168</sup> The final defective heuristic discussed by Eisenberg is that of faulty risk-estimation faculties. This heuristic is related to the disposition cognitive limitation discussed above because it involves people systematically underestimating the risks that they undertake.<sup>169</sup> In fact, not only do people underestimate risks, but they actually completely ignore what they perceive as “low-probability risks.”<sup>170</sup> Conversely, individuals are also prone to overestimate certain low-probability risks.<sup>171</sup>

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270–71 (1984); Howard Kunreuther, *Limited Knowledge and Insurance Protection*, 24 PUB. POL’Y 227, 243 (1976); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 164, 166, 174–75 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 3, 11 [hereinafter Tversky & Kahneman, *Judgment*]).

165. *See id.* at 220–22.

166. *Id.* at 221 (quoting Tversky & Kahneman, *Judgment*, *supra* note 164, at 1127).

167. *See id.* at 222 (citing FISKE & TAYLOR, *supra* note 164, at 269–700 [sic]; Tversky & Kahneman, *Judgment*, *supra* note 164, at 1124; Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 164, at 23–25; Kenneth J. Arrow, *Risk Perception in Psychology and Economics*, 20 ECON. INQUIRY 1, 5 (1982)).

168. *See id.* at 222 (citing Martin Feldstein, *The Optimal Level of Social Security Benefits*, 100 Q.J. ECON. 303, 307 (1985)). “For example, a major rationale for mandatory and voluntary but tax-favored pension programs is that most people lack the foresight to adequately save for retirement because of faulty telescopic faculties.” *Id.* (citing Feldstein, *supra*, at 303).

169. *See id.* at 223 (citing THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 237–40 (1986)).

170. *Id.* at 223.

171. *See id.* at 223 (citing VISCUSI & MAGAT, *supra* note 159, at 83–97); *cf.* Hillman & Rachlinski, *supra* note 1, at 451 (“Although excessive concern with risk could induce consumers to overcome some of the rational and social factors that discourage them from reading boilerplate,

The problems with form contracts rest, in part, on the cognitive limitations discussed above.<sup>172</sup> First, many of the boilerplate terms contained in standard form contracts relate to future events which have a low probability of occurring. Therefore, several of the cognitive limitations apply to such boilerplate terms, including bounded rationality, disposition (over-optimism), underestimation of risks, and disproportionate weighing of present benefits and costs over future benefits and costs.<sup>173</sup> As Eisenberg astutely observed:

The bottom line is simple: The verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high. In contrast, the low probability of these nonperformance terms' coming into play heavily discounts the benefits of search and deliberation. Furthermore, the length and complexity of form contracts is often not correlated to the dollar value of the transaction. Where form contracts involve a low dollar value of performance, the cost of thorough search and deliberation on preprinted terms, let alone the cost of legal advice about the meaning and effect of the terms, will usually be prohibitive in relation to the benefits. Faced with preprinted terms whose effect the [consumer] knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational [consumer] will typically decide to remain ignorant of the preprinted terms.<sup>174</sup>

In short, it is hard for consumers to understand form terms. Most of the terms probably will never affect them. Further, even if the consumer reads the form and wishes to make changes, she is almost always powerless to change them by bargaining anyway. So it is no surprise that consumers decide to simply ignore such terms.

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several features of the business-to-consumer standard form contract suggest that consumers are more apt to worry too little about contractual risks.”).

172. See Eisenberg, *supra* note 1, at 240.

173. See *id.* at 240–41.

174. *Id.* at 243 (citing Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990)).

### B. *Social Factors/Pressure*

In addition to cognitive limitations, social factors affect consumers' standard form contracting behavior as well. These social pressures encourage consumers to sign such contracts quickly.<sup>175</sup> Consumer assent occurs even when the consumer knows she should study the contract in more detail. This is because businesses present contracts to consumers in a manner that makes any effort at reflective contemplation on the terms appear awkward or even confrontational.<sup>176</sup> While poring over the fine print, the consumer may fear that she is perceived as not fully trusting the company or its sales agent. This sense of confrontation can be especially stark when it follows a fairly good-natured, time-intensive negotiation with an agent wherein a feeling of mutual goodwill has otherwise developed.<sup>177</sup> Therefore, "businesses can draw upon a host of social conventions and influences that lead people into quiet compliance when signing standard form contracts."<sup>178</sup> These practices also have implications for how the law should treat such standard form contracts. Namely, such social conventions tend to discourage full and meaningful assent.

### C. *Literacy Problems*

Yet another recent compelling discovery directly impacts the law's treatment of standard form contracts—illiteracy.<sup>179</sup> As discussed previously, much of the current law of contracts relating to standard forms is premised on the consumer's duty to read.<sup>180</sup> Most consumers do not read their contracts at all, and the ones that do have trouble understanding them.<sup>181</sup>

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175. See Hillman & Rachlinski, *supra* note 1, at 448.

176. *Id.* ("For example, businesses sometimes present forms to consumers when other consumers, also in a hurry, are waiting in line, such as at the car rental counter. Businesses want consumers to believe that by reading the boilerplate, they are wasting everybody's time. At the very least, the business's agent may send signals that he is in a hurry." (citing Eisenberg, *supra* note 1, at 242; Meyerson, *Reunification*, *supra* note 1, at 1269; Slawson, *Standard Form Contracts*, *supra* note 1, at 529)).

177. *Id.*

178. *Id.* at 450.

179. See White & Mansfield, *Literacy and Contract*, *supra* note 137, at 233.

180. See Calamari, *supra* note 1, at 341–42.

181. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1179; see also Hillman & Rachlinski, *supra* note 1, at 446 ("Reading and understanding boilerplate terms is difficult and time consuming for consumers. Consumers recognize that they are unlikely to understand the lengthy and complicated

The reason most commentators assume that consumers do not understand contracts is because consumers generally lack legal training.<sup>182</sup> However, in a recent article entitled *Literacy and Contract*, Professors Alan White and Cathy Lesser Mansfield note that literacy rates in the United States are plummeting at an alarming rate, and in fact many, if not most, consumers who enter into form contracts may not even understand the basic, nonlegal English wording contained in the forms they sign.<sup>183</sup> The basis for this (relatively) new information is the 1992 National Adult Literacy Survey (NALS), conducted by the U.S. Department of Education.<sup>184</sup> The NALS study divided adult literacy into five levels with Level V the highest level of literacy and Level I the lowest.<sup>185</sup> The NALS study did not deal directly with standard form contracts. However, two of the questions did involve an area of comparable complexity—calculating the cost of consumer credit after reading various provided disclosures.<sup>186</sup> This task was determined to be of Level V complexity—a degree of literacy which the NALS survey revealed that only 3–4% of American adults possess.<sup>187</sup> Therefore,

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legal jargon in the boilerplate.” (citing Eisenberg, *supra* note 1, at 242; Richard L. Hasen, Comment, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 428 (1990); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 598–99 (1990); Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1231)).

182. See Meyerson, *supra* note 1, at 1270 (citing Colin K. Kaufman, *The Resurrection of Contract*, 17 WASHBURN L.J. 38, 45 (1977); Commercial Union Assurance Cos. v. Gollan, 394 A.2d 839, 841 (N.H. 1978); Unico v. Owen, 232 A.2d 405, 410 (N.J. 1967)).

183. See White & Mansfield, *supra* note 142, at 234 (“New research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to ‘read’ contemporary consumer contract documents are unlikely to understand them.”).

184. *Id.* at 235 (citing IRWIN S. KIRSCH ET AL., ADULT LITERACY IN AMERICA: A FIRST LOOK AT THE RESULTS OF THE NATIONAL ADULT LITERACY SURVEY xiii–xvii (1993)).

185. See *id.* at 236. To explain further:

On the NALS scale, Level I for document literacy corresponds to extremely simple tasks, such as signing one’s name on a social security card, or locating a single piece of information that is labeled explicitly on a form with no other distracting information. Level II document tasks are only slightly more complex, requiring the reader to locate information on row and column tables, and to deal with similar, distracting information. Tasks at Levels III, IV, and V require readers to use more complex tables and charts, with multiple columns and nested structures, and numerous confusingly similar pieces of information. For example, one Level IV task was based on a bus schedule that had different sections for outbound and inbound service, different rows for different times and different days of the week, and columns for various stops. From the document, readers were asked to calculate the interval between buses on a given day at a given place and time.

*Id.* (citing KIRSCH ET AL., *supra* note 184, at 91).

186. *Id.* at 237.

187. *Id.* at 237–38. The task actually explored two different types of literacies—documentary and quantitative. The documentary literacy component involved analysis of a table which contained

literally 96–97% of all American adults would not have been capable of understanding a standard form contract of comparable complexity. The foreboding conclusion is clear: “The degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within reach of the majority of American adults.”<sup>188</sup> Thus, current contract law is dissonant with the reality of consumer literacy, and the implications of this dissonance are profound.<sup>189</sup>

The quality of research and findings in the area of consumer standard form contracting is compelling. There are many problems with such contracts; those concerning our human frailties were largely unknown or unacknowledged when much of current contract law applicable to standard form contracts was created. Our limited ability to cognitively process the information and risks associated with contracts, the social pressures which affect our contracting behavior, and our literacy levels all have a tremendous impact on the standard form contracting process. For the law to ignore these newly discovered limitations would be a mistake.

#### IV. A DEFENSE OF SUBSECTION 211(3) OF THE RESTATEMENT (SECOND) OF CONTRACTS

Subsection 211(3) of the Restatement has been inadvisably neglected and/or castigated as a doctrinal tool for use with standard form contracts, and should be newly embraced as a sound principle for protecting the sanctity of consumer assent to such contracts. This Part discusses the reasons that subsection 211(3) should be reconsidered. First, the rule is completely consonant with the objective theory of contracts, which has long been the settled basis for determining mutual assent. Second, it is reasonable for the law to take steps to accommodate newly emerging evidence of consumers’ cognitive and psychological limitations in grappling with standard form contracts. The law should adopt a rule that more accurately addresses both consumers’ cognitive limitations and the

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features of two competing credit cards, and the test subjects were asked to perform a comparative analysis of the card terms from the two merchants. The survey showed that only 3% of the U.S. adult population had this Level V documentary literacy. The quantitative literacy component involved the test subject computing total interest to be paid from information contained in a home equity loan advertisement which provided “the APR, amount financed, monthly payment, and term in months.” The survey showed that only 4% of the U.S. adult population had this Level V quantitative literacy. White & Mansfield, *supra*.

188. *Id.* at 239.

189. *Id.* at 242.

tendency of business entities to exploit those limitations. Third, the recent evidence of surprisingly low literacy levels in the United States militates in favor of such an approach. Finally, a fundamental fairness inheres in applying subsection 211(3), especially given the merchant's knowledge of the consumer's expectations, and indirectly, her cognitive limitations.

As discussed previously, use of standard form contracts causes many well-known problems, including: (1) the parties' unequal bargaining power; (2) the lack of negotiation inherent in such contracts; and (3) the fact that consumers neither read nor understand them. As a result of these problems, consumers usually are largely unaware of what they are agreeing to.<sup>190</sup> At least two approaches to these types of contracts have been developed—principally unconscionability and subsection 211(3), with unconscionability by far the most frequently used doctrine. Subsection 211(3), by contrast, was incorporated into the second Restatement but then promptly discarded by a substantial majority of courts and commentators. In the words of Professor White, “section 211(3) has slumbered peacefully for more than fifteen years in the Restatement without causing difficulty to buyers, sellers, or any other commercial parties.”<sup>191</sup> Moreover, drafters decided against including a subsection 211(3) analogue in either Revised Article 2, Article 2B, or UCITA.<sup>192</sup>

As a result, unconscionability remains the primary tool in the UCC for dealing with standard form contracts, barring further changes to the text of the UCC. Subsection 211(3) has been discarded for present purposes by many, notwithstanding its sensible solution for the problem of lack of consumer assent to form contracts. Given the realities of the online contracting environment, and with form language more inaccessible than ever before, the rejection of subsection 211(3) should be “re-examined in the light of consumer protection.”<sup>193</sup>

Initial resistance to expanding the law to meaningfully incorporate subsection 211(3) is likely. Because the vast majority of all contracts entered into are adhesion contracts, many commentators and courts assume that these contracts must be presumptively enforceable to ensure

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190. See *supra* Part II.A.

191. White, *supra* note 1, at 323.

192. See Braucher, *supra* note 22, at 1816.

193. Noriko Kawawa, *Contractual Liability for Defects in Information in Electronic Form*, 8 U. BALT. INTELL. PROP. L.J. 69, 178 (2000).

marketplace stability.<sup>194</sup> The thought is that unconscionability impinges in some manner on freedom of contract, and the law should intrude no further because it never has before. However, early in the scholarship on standard form contracts, Kessler astutely noted that the common law of contracts can and should change in response to the changing needs of the day:

The task of adjusting in each individual case the common law of contracts to contracts of adhesion has to be faced squarely and not indirectly. This is possible only if courts become fully aware of their emotional attitude with regard to freedom of contract. Here lies the main obstacle to progress, particularly since courts have an understandable tendency to avoid this crucial issue by way of rationalizations. They prefer to convince themselves and the community that legal certainty and "sound principles" of contract law should not be sacrificed to dictates of justice or social desirability. Such discussions are hardly profitable.<sup>195</sup>

Kessler's observations could just as well have been made today. Courts are empowered to act in the interest of the greater good with respect to contract law—the rules are not forever static.<sup>196</sup> As Kessler further observed, "[i]n the development of the common law the ideal tends constantly to become the practice."<sup>197</sup> Certainty of legal rules, although itself a high virtue,<sup>198</sup> should often be subordinated in the name of social progress.<sup>199</sup> Thus, when a change in doctrine is otherwise warranted, legal change should not be avoided solely on the basis of traditionalism.<sup>200</sup>

All of these legal notions are applicable here. Subsection 211(3) is a sound rule. For many reasons, courts and commentators alike should favor its implementation as a meaningful tool in the effort to resolve the

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194. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1180 ("Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable." (citing 3A CORBIN, CORBIN ON CONTRACTS § 559A, at 479 (C. Kaufman Supp. 1982))); *see also* Leff, *supra* note 74, at 144 ("[T]he economics of the mass distribution of goods make [never enforcing adhesion contracts] a commercially absurd answer.").

195. Kessler, *supra* note 1, at 637.

196. *Id.* at 638.

197. *Id.*

198. *See* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (stating that "in most matters it is more important that the applicable rule of law be settled than that it be settled right").

199. *See* Kessler, *supra* note 1, at 638.

200. *Id.*

cognitive dissonance between the appearance of negotiated consent and the reality of a vast body of unread boilerplate ostensibly agreed to by the consumer. This section will explore and amplify some of the primary reasons for the adoption of subsection 211(3).

*A. Subsection 211(3) Sounds in Objective Theory*

As discussed earlier, the objective theory of contracts is the dominant principle of mutual assent to contracts. Objective theory is based on the reality that the only predictably reliable indicium of a party's desire to be contractually bound is the outward appearance of the manifestations of such party. That is, secret contrary intent—such as that effected by jesting about one's intention to contract—is of no relevance to determining objective contractual intent. Thus, as Calamari and Perillo define objective theory, “[a] party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean.”<sup>201</sup>

Traditionally, objective theory has been tied to standard form contracts in at least one manner. Commentators and courts alike have always deemed it reasonable to conclude that when a party signs a contract form, that party has thereby assented to the contract and all of its terms. Hence the rise of the duty-to-read principle. The traditional theory is that it is reasonable for the merchant to conclude that the consumer has assented to the whole contract by signing it. Therefore, the consumer must be sure to read the contract that she is binding herself to, since her failure to do so has historically not been a sufficient excuse.

But traditional objective theory and the duty to read have been completely one-sided. The entire onus has been placed on consumers, with only the unconscionability doctrine to protect them. The duty-to-read rule permits merchants to pack their standard form contracts with one-sided terms, and it is thus at least ostensibly reasonable to hold that the consumer is bound by those terms when she signs. As Professor Rakoff has thus sardonically noted, “[t]his ‘duty’ can just as well be viewed as a refusal to impose any duty on the drafting party to ascertain whether form terms are known and understood.”<sup>202</sup>

There is no reason, however, that merchants, unlike consumers, should not be bound by objective theory. Subsection 211(3) provides a

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201. CALAMARI & PERILLO, *supra* note 83, at 27.

202. Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1187.



perfectly sound means by which to inject objective theory into the standard form contract scenario from the perspective of the commercial enterprise. Consider the language of section 211. Subsection (1) upholds the traditional duty-to-read rule and the objective theory from the standpoint of the consumer's actions:

Where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.<sup>203</sup>

However, subsection 211(3) conversely places a duty on the enterprise: “[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”<sup>204</sup> By rejecting subsection 211(3) as a viable rule for construing the scope of assent to form contracts, commentators and courts have refused to impose this objective-theory based duty on businesses. But it is entirely reasonable impose such a duty. Why should businesses not be held accountable for their awareness of consumer expectations regarding contractual terms?

For example, suppose that a business has just placed a particularly severe forum selection clause, or perhaps an onerous arbitration clause, into a contract. Further suppose that the business was very careful not to point out this clause to the consumer, but was reasonably aware that the consumer would object if she knew about the clause, and would even likely refuse to enter into the contract had she known of its inclusion.<sup>205</sup> What would traditional objective theory say in response to such an apparent manifestation of assent to the form contract by the consumer? The consumer's manifestation of assent—her signature—should be taken to mean what the business would reasonably conclude it to mean. If the business reasonably knows that the consumer's signature does not constitute assent to the draconian clause, then objective theory posits

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203. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1979).

204. *Id.* § 211(3).

205. Note that I am not here going to debate whether and to what extent consumers may or may not so react to such clauses. It may well be that most consumers would not care much. See Andrew J. McClurg, *A Thousand Words Are Worth a Picture: A Privacy Tort Response to Consumer Data Profiling*, 98 NW. U. L. REV. 63, 129 (2003) (“[W]ere McDonald's to offer free Big Macs in exchange for DNA samples, there would be lines around the block.” (citing Bernice Kanner, *One Person's Privacy Is Another's Free Goody*, SAN DIEGO UNION-TRIBUNE, Aug. 21, 2001, at 4)). However, I am arguing that the rule should be in place so that consumers who are so affected are adequately protected in the event their intentions and expectations are thwarted.

that the consumer's assent should not extend to the severe clause—regardless of the consumer's failure to read it.

However, subsection 211(3) also protects businesses by addressing the possibility that consumers will simply testify after the fact that they did not know a particular clause was present. Specifically, subsection 211(3) requires both a showing that the consumer would have *refused* to enter into the contract at all because of the term and that the business *knew* this fact. Under principles of objective theory, it naturally follows from this showing that the business may not extend the consumer's ostensible assent to the term in question.

Notwithstanding the reluctance of courts to embrace subsection 211(3) or any of its counterparts, the essence of the doctrine is not a new theory. Over sixty years ago, Kessler noted that in standard form contract disputes, courts should determine what the consumer reasonably expected from the business by contracting and whether the business “disappointed reasonable expectations based on the typical life situation.”<sup>206</sup> Further, in Llewellyn's first well-known discussion of standard form contracts, closer to seventy years ago, he observed that “where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.”<sup>207</sup>

Moreover, modern commentators are aware of this reality as well. At least one observer, Professor Michael Meyerson, has previously observed that, from the merchant's perspective, objective theory limits the nature of a consumer's assent to a form contract:

[C]onfusion continues to reign mostly because those seeking answers have searched too hard. The conceptual difficulties stem from one fundamental error: the common law presumption, often conclusive, that consumers who sign form contracts are aware of, understand, and assent to the unread, unexpected and un contemplated terms in the form contracts. *This presumption of assent conflicts with the objective theory of contracts.* Because the drafters of these contracts know not only that their forms will not be read, but also that it is reasonable for consumers to

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206. Kessler, *supra* note 1, at 637.

207. Meyerson, *supra* note 1, at 1277 (quoting Llewellyn, *supra* note 1, at 704). Meyerson noted that this early passage from Llewellyn sounded much like the doctrine of reasonable expectations applicable in insurance law. Meyerson, *supra*. See generally Keeton, *supra* note 8 (articulating the doctrine of reasonable expectations).

sign them unstudied, a reasonable drafter should have no illusion that there has been true assent to these terms. . . .

In short, courts correctly applying the objective theory to consumer form contracts will not assume automatically that there is objective agreement to all terms merely because they have been printed and a document has been signed. Rather, courts will try to determine how a reasonable drafter should have understood the consumer's agreement.<sup>208</sup>

Thus, Meyerson states that, under principles of objective theory, merchants cannot reasonably conclude that a consumer has assented to the unread terms of a form contract.

Utilizing subsection 211(3) to apply objective theory to standard form contracts also has important implications for the traditional duty to read. As noted above, courts have historically held that a consumer's signature on a form contract "creates a *conclusive presumption*, except as against fraud, that the signer read, understood, and assented to its terms."<sup>209</sup> But it is clear that this idea of comprehensive assent has always been a fiction. Indeed, the only reason such a presumption had to be fashioned was "because such a presumption was so counter-factual."<sup>210</sup> The duty to read will continue because subsection 211(1) still presumes, as an initial matter, that the consumer's signature or other assent to a form signifies consent to all of its terms. However, the presence of subsection (3) qualifies the duty to read so as to prevent the merchant from unduly exploiting the consumer's failure to actually read. Such a doctrine represents significant progress on the consumer protection front.

Moreover, Professor Calamari discussed the precursor to section 211 in his influential article on the duty to read.<sup>211</sup> He seemed to approve of the rule (which was already in its final form) from an objective standpoint soon after it was first proposed:

The *Restatement Second* thus recognizes the utility of standard agreements but refuses to allow them to be used unfairly. This seems a reasonable resolution of the problem and in general accord with the rule . . . that even an objective manifestation of assent stemming from a failure to read should not preclude

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208. *Id.* at 1265 (emphasis added).

209. *Id.* at 1273 (quoting *Fivey v. Pa. R.R. Co.*, 52 A. 472, 473 (N.J. 1902)).

210. *Id.*

211. *See* Calamari, *supra* note 1, at 358–60.

consideration of whether there is true assent to unfair or unexpected terms.<sup>212</sup>

Calamari, therefore, fully approved of what is now subsection 211(3) and considered it an eminently reasonable expansion of the law governing form contracts. Indeed, section 211, and subsection (3) in particular, is well grounded in objective theory and is thus a sensible rule to apply in standard form contract cases. Criticism of the rule seems focused on the reflexive belief that the status quo must be maintained and that nothing impeding the interests of commercial enterprises should be added to the law.<sup>213</sup> But the law must respond to new considerations revealed by experience, and the ever-increasing complexity of form contracts—both offline and online—presents such a factor.

*B. Subsection 211(3) Is Further Warranted by Emerging Recognition of Deficiencies in Consumers' Ability to Understand Standard Form Contracts*

Newly emerging psychological evidence of the cognitive limitations of human decisionmaking with respect to standard form contracts demonstrates the need for innovation in this arena. The rules of contract law developed in light of a now antiquated and quaint paradigm of two merchants, vigorously dickering over all terms of a contract.<sup>214</sup> In light of this legal structure, standard forms began appearing. Yet other than the duty to read and presumed assent upon signing, no innovations to contract law appeared until the rise of the unconscionability doctrine in the middle of the twentieth century.<sup>215</sup> This doctrine is an important fail-safe in the area of consumer protection against terms in standard form contracts. However, as noted earlier, the unconscionability doctrine is reserved for only the most severe of terms. A more finely honed principle is thus necessary.<sup>216</sup>

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212. See *id.* at 360.

213. See Braucher, *supra* note 22, at 1816–17.

214. See Slawson, *Standard Form Contracts*, *supra* note 1, at 529 (“The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”); see also Rakoff, *Contracts of Adhesion*, *supra* note 1, at 1216 (“Deeply embedded within the law of contracts, viewed as private law, lies the image of individuals meeting in the marketplace . . .”).

215. See U.C.C. § 2-302 (1989); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

216. Meyerson, *supra* note 1, at 1286 (citing Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1337 (1982)).

Moreover, both the duty to read and the unconscionability doctrine were developed by commentators and courts without a fully developed recognition of the cognitive problems associated with consumer interaction with standard form contracts. The law of contracts must consider these new realities in determining whether existing legal regimes are sufficient to suit the present needs of contracting parties.<sup>217</sup> Since the development of rules such as the duty to read and unconscionability, additional knowledge of human decisionmaking capacities has surfaced. Humans are only boundedly rational; they lack the cognitive resources to take all information and possibilities into account.<sup>218</sup> Moreover, humans are overly and irrationally optimistic about the likelihood of future positive outcomes as well as the unlikelihood of the occurrence of adverse consequences. These outlooks factor into their decisionmaking as well.<sup>219</sup> These human characteristics can and should be taken into account by a more perfect law of contracts.

Implementing subsection 211(3) of the Restatement is one way to do that. Subsection 211(3) protects consumers from the failings of their cognitive processes. By including a contractual term which the business is aware violates the consumer's reasonable expectations, the business exploits the consumer's cognitive limitations.<sup>220</sup> As Eisenberg observes, subsection 211 indicates that "the law is properly moving toward basing the enforceability of preprinted terms, as well as the role of such terms in contract formation, purely on the limits of cognition, rather than on unfairness."<sup>221</sup> Thus, implementing subsection 211(3) can help level the playing field in a manner wholly consistent with cognitive limitations and the objective theory of contracts.

### *C. Subsection 211(3) Is Further Warranted by Emerging Recognition of Illiteracy*

The arguments above apply with equal force to the comparatively recent discovery of surprisingly low literacy levels in the United States. As discussed above, the levels are such that quite possibly as few as 3%

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217. See, e.g., Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 195-96 (1983) ("Developments in tort and contract law in this century are, indeed, 'halves of the same whole,' responding to the felt needs of the times.").

218. See *supra* Part III.A.1.

219. See *supra* Part III.A.2.

220. See Eisenberg, *supra* note 1, at 247.

221. *Id.* at 248.

of the adult American population possess the literacy skills to read and comprehend complex contractual language.<sup>222</sup> This fact makes consumer compliance with the duty to read all the more improbable and justifies adjustment of the standard form contract regime. Implementing subsection 211(3) as positive law would be a logical step toward addressing this social need. In fact, White and Mansfield noted in their work on literacy and its effect on contract law, that “[o]f all the approaches to adhesion contracts, this one [section 211] probably is the most genuine in its recognition that there might have been no agreement-in-fact and that no party dealing with the consumer reasonably ought to assume that the consumer agreed to all of the printed terms.”<sup>223</sup>

Quite simply, literacy levels are profoundly important both to contract law and to the continued vitality of the duty-to-read rule in contracts.

The social ideology of the United States and of Great Britain has been built on contract law. If this form of law cannot survive the test of reading competence within the population, the contract system and the social edifice that it supports will be no better able to sustain themselves than any other aspect of American society.<sup>224</sup>

Thus, courts and commentators should recognize that the literacy levels of the twentieth and twenty-first centuries, sadly, are possibly quite different than they were in the eighteenth and nineteenth centuries, when the ideas of caveat emptor and personal responsibility were at their zenith. The common law of contracts can account for and adapt to the substantial drop in literacy levels:

The law of contracts and consumer protection has yet to take account of the data now available regarding adult literacy and the readability of contract forms . . . . Consumer law doctrine has remained static despite numerous changes in circumstances surrounding consumer contracting. These changes include a continual increase in the volume and complexity of contract forms, a marked increase in the number of consumers deemed eligible for consumer credit, evidence of increased use of abusive, unfair, or at least unexpected terms in consumer contracts, evidence that consumers neither want to nor are capable of agreeing in fact to the terms contained in modern

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222. See *supra* Part III.C.

223. White & Mansfield, *supra* note 142, at 250.

224. *Id.* at 233 (quoting JONATHAN KOZOL, *ILLITERATE AMERICA* 18 (1985)).

consumer contracts, and studies suggesting that consumers, in large part, are unable to use the legally-mandated disclosure documents. Courts continue to enforce adhesion contracts against consumers in all but the most egregious cases . . . .<sup>225</sup>

Thus, the low literacy levels provide another compelling reason for courts to consider adopting subsection 211(3) as a new tool in policing assent to standard form contracts, along with emerging recognition of cognitive limitations and the rule's grounding in the objective theory of contracts.

In sum, subsection 211(3) deserves careful reexamination as a rule for application to standard form contracts entered into by consumers. The rule comports squarely with the objective theory of contracts. It views the merchant's perception of the consumer's assent through the objective theory lens—the merchant cannot include a term which it reasonably knew the consumer would not have accepted had she known of it. The rule would also provide an ameliorative salve in light of emerging evidence of the cognitive and psychological limitations of individual consumers grappling with the standard form contract phenomenon. Finally, application of subsection 211(3) is also warranted in light of the stark reality of present literacy levels in this country. For all of these reasons, subsection 211(3) should be reexamined and implemented as positive law for dealing with the problem of consumer assent to standard form contracts.

## CONCLUSION

Standard form contracts are here to stay. They contribute to economies of scale and efficiency. Furthermore, standard form contracts reduce costs and allow businesses to offer lower retail prices than would be available if all contracts had to be individually negotiated or required resort to legislative default rules rather than boilerplate. But such contracts come at some cost to consumers. Consumers ignore boilerplate provisions and would not understand much of the legalese in the

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225. *Id.* at 234–35 (citing Cathy Lesser Mansfield, *The Road to Subprime "HEL" was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 512–14, 527–31, 556–61 (2000) (noting various abusive provisions in subprime mortgage loans); Paul D. Carrington, *The Dark Side of Contract Law*, 36 TRIAL 73 (2000); Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214, 223 (3d Cir. 2000); Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 289–91 (Cal. Ct. App. 1998); Johnson v. Tele-Cash, Inc., 82 F. Supp. 2d 264, 278–79 (D. Del. 1999); *In re Sprouse*, 577 F.2d 989, 993 (5th Cir. 1978); MERCHANTS OF MISERY: HOW CORPORATE AMERICA PROFITS FROM POVERTY (Michael Hudson ed., 1995)).

contracts even if they did read them. Businesses thus have every incentive to exploit consumer ignorance by placing more onerous clauses into contracts than they would otherwise.

The law has devised several principles to deal with the realities of standard form contracts. One is that a consumer who signs or otherwise manifests assent to a contract is deemed to have assented to all terms contained therein, whether or not she has read the contract. In fact, because of this principle the law traditionally declared that the consumer has a duty to read the form. The only meaningful doctrine protecting consumers implemented thus far is the unconscionability doctrine, but it reaches only the most severe and oppressive clauses. Subsection 211(3), which provides broader protection to consumers, has never gained ascendancy outside the insurance law context. Indeed it was specifically rejected as part of the recent Article 2 revision process, as well as those of Article 2B and UCITA.<sup>226</sup>

However, subsection 211(3) has much to offer the world of twenty-first century contracting, where standard form contracts proliferate and are more ubiquitous than ever before, most notably in the electronic contracting environment on the Internet. First, it is consistent with the objective theory of contracts. Merchants who provide standard forms to consumers, but have reasonable grounds to believe that one or more terms therein would be unacceptable to the consumer, should not interpret consumers' apparent manifestations of assent to such forms as including the suspicious term. Although it is true that in many cases a particular clause would run afoul of the unconscionability doctrine as well as subsection 211(3), the rules are conceptually distinct and thus both serve useful purposes in the matrix of contract law. Second, subsection 211(3), serves to further innovate the law in response to emerging understanding of the cognitive limitations of decisionmaking. The law should always be crafted to serve the greatest good, and thus should recognize and take into account such limitations as our bounded rationality in decisionmaking, as well as our disposition limitations. Third, plummeting literacy levels also compel further innovation in the law. Finally, holding businesses accountable for their recognition that a consumer would not agree to a particular term seems sensible and just. Were the roles reversed, the business would want to be treated in the

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226. Braucher, *supra* note 22, at 1816.



same manner.<sup>227</sup> It is thus fair to apply subsection 211(3) to business conduct. Open and honest communication during the contract negotiation process will produce better results, and the additional information will more clearly allow market principles to function at an optimum level.

The time has therefore come for courts to openly embrace and adopt subsection 211(3) for use in adjudicating standard form contract disputes. This provision of the Restatement is a useful innovation in the law of contracts and complements the doctrine of unconscionability. In particular, subsection 211(3) allows courts to take into account recently gained knowledge about humans' cognitive limitations and literacy levels, and falls squarely within the objective theory of contracts. Subsection 211(3) is a fair and just rule. Its time has come.

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227. Section 211(3) is, after all, somewhat akin to the "Golden Rule" in requiring a business to treat the consumer how the business would wish to be treated if it were the consumer in the transaction. See *Matthew 7:12* ("So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.").